

REMARKS

Applicants appreciate the courtesies extended by Examiners Keith Hendricks and Viren Thakur during an interview on April 18, 2007 with Applicants' representative, Allan A. Fanucci. The comments appearing herein are substantially in accord with those presented and discussed during the interview.

Claims 1-10 and 25-33, as amended, and new claims 34-37, appear in this application for the Examiner's review and consideration. Claim 1 has been amended to recite that the packaging sleeve protects all of the outer surface of the shell, and that the entire packaging sleeve is partly or entirely transparent (*See, e.g.*, Specification at page 8, lines 8-10). Claim 25 has been rewritten in independent form. Claim 29 has been amended to recite that the plastic foil has a smooth surface in contact with the shell. New claim 34 includes the features of claims 1, 25, and 29. New claims 35-37 are based on claims 8-10, respectively. No new matter is believed to have been introduced by any of the amendments or new claims, such that entry of the claims is warranted at this time.

Applicants appreciate the withdrawal of the rejection of claims 1-4, 8-10, 25, 26, 28, 30, and 32 under 35 U.S.C. § 103(a) as obvious over U.S. Patent No. 6,235,324 to Luigi Grigoli et al. ("Grigoli") in view of European Patent Application No. EP 0848910 to Kuehl ("Kuehl").

Claim 1 was rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 1 recites "a packaging sleeve for protecting all or part of the outer surface of the shell," and subsequently recites "... and the entire outer surface of the shell is in complete surface-to-surface contact with the packaging sleeve." Claim 1 has been amended to remove the term "or part." Applicants respectfully submit that this rejection has been overcome.

Before addressing the rejections it is important to note that the present claims are directed to a packaged decorated composite frozen confection product. The product includes an open-ended shell with a decorative pattern design forming a smooth surface of the outer wall of the shell, a filling of a frozen confection at least in the interior volume of the shell, and a packaging sleeve for protecting all of the outer surface of the shell. The shell is made of a solid, fat-based composition and has a shell wall that defines an interior volume for holding at least a portion of an ice confection therein. The shell wall has a substantially smooth outer surface. The

pattern design includes strings of a first semi-solid confection material that form a mesh of strings and a second confection material of a contrasting color to that of the first confection material located between the strings. The packaging sleeve is formed in a shape that corresponds to the desired shape of the outer surface of the shell and has an inner surface that is in contact with the outer surface of the shell to form and display the pattern. The entire packaging sleeve is partly or entirely transparent, and the entire outer surface of the shell is in complete surface-to-surface contact with the packaging.

Applicants submit that the present claims are novel and inventive. In addition to the comments made in this and the prior amendment, applicants submit herewith a Rule 132 Declaration of Alain Leas (the Leas Declaration") and urge that the application be allowed.

Claims 1-4, 8-10, 25, 26, 29-30, 32, and 33 were rejected under 35 U.S.C. § 103(a) as obvious over Grigoli in view of Kuehl, and further in view of European Application No. EP 276333 to Damato ("Damato") for the reasons cited in the previous Office Action that was mailed December 7, 2005.

Grigoli describes a product in which ice cream is contained inside a chocolate shell, which is inserted in a wafer (Col. 1, lines 5-7). The chocolate shell extends along all the inside surface of the wafer and projects for a certain portion upwardly beyond the wafer (Col. 1, lines 8-11). The product is inserted into a paper cone (Col. 2, lines 52-55) so that the outer appearance of the cone is not visible until it is removed from the package for consumption. As acknowledged by the Examiner, Grigoli does not teach that its chocolate cone includes a decorative pattern that includes a first layer of strings made of a semi-solid confection and a second confection of contrasting color as recited in claim 1, that the strings are flattened or pressed as recited in claim 2, that the shell has a shiny appearance as recited in claim 3, or that the pattern is maintained after removal of the package as recited in claim 4. Also, the Leas Declaration confirms these differences (see ¶7).

Kuehl is cited for its teaching of a chocolate coating having a marbled appearance. Kuehl is concerned with ice cream bars coated with chocolate having a marbled appearance (Examples 1-6). The coating is prepared from a coating material, which may be chocolate, or a water-based material such as creamy mixes, non-aerated ice cream mixes, sorbets, water ices, or fruit purees. Kuehl teaches that coatings in which one layer consists of either milk or plain chocolate and the other layer consists of white chocolate are the most interesting visually because

there may be a marked contrast between the milk or plain chocolate and the white chocolate. Kuehl does not disclose a packaging sheet for wrapping the bars, and either places strips of chocolate in a mold or applies stripes or dots of chocolate upon an ice confection in the shape of a bar. Thus, Kuehl does not teach that a chocolate shell is in complete surface-to-surface contact with a packaging sleeve. Kuehl focuses instead on the provision of different colors or surface contours to provide a visually interesting product during consumption. The Leas Declaration confirms these differences (see ¶8).

Damato is cited for its teaching of a container and lid that consist of a liquid-tight, transparent material to make a package of ice cream visible to the consumer (Abstract). Damato also appears to teach advertising on the material (FIG. 3).

Claim 1 recites that the packaging sleeve protects *all* of the outer surface of the shell and that the entire outer surface of the shell is in complete surface-to-surface contact with the packaging sleeve. Grigoli does not teach or suggest either of these features (*See* FIG. 2) because the chocolate shell is first inserted into the wafer, and then inserted into a paper cone. The paper cone does not contact the whole outer surface of the chocolate shell (see, Leas declaration ¶¶12 and 14).

Moreover, there is nothing in Grigoli to even suggest that a pattern design be placed on the chocolate shell. In fact, by inserting his chocolate shell into the wafer, and by positioning the wafer and upper portion of the chocolate shell in a paper envelope, there would be no advantage in appearance of Grigoli's product, since the consumer would only see the envelope or only a portion of the chocolate shell and a wafer cone and not the inner chocolate shell.

There is simply no suggestion or motivation to combine Grigoli with Kuehl, especially because Grigoli's chocolate shell is mostly hidden inside the wafer. While Kuehl does teach that stripes can be provided into a mold, there is no packaging sheet employed in that process, and subsequently, no teaching that the chocolate shell is in complete surface-to-surface contact with a packaging sleeve (see, Leas declaration ¶13).

The Examiner maintains that since Kuehl uses at least two types of chocolate having different colors, it would have been obvious that the combination of two types of chocolate also impart a different taste to the chocolate shell. Thus, in addition to appearance, marbling the shell also changes the flavor of the shell. The primary purpose of Kuehl, however,

is to impart a pleasing appearance, rather than a more appealing taste. For example, Kuehl explains that the marbled appearance may include patterns or appearances such as marbled, mottled, hued, variegated, dappled, clouded, drizzle, grizzle, splattered, blown, striped, spotted, speckled, striated, veined or flecked, etc. (Page 2, lines 20-22), refers to the appearance of "particularly attractive coatings" (Page 2, lines 38-40), and describes which coatings are "the most interesting visually" (Page 2, lines 45-47). (See also, the Leas declaration ¶¶15 and 16).

The Examiner states that Grigoli also discloses decorating the product, and therefore Grigoli recognizes the need for providing product appeal and enhancing the taste of the product. The decoration described by Grigoli involves dosing on the upper surface a certain quantity of chopped almonds or by applying a decoration of liquid chocolate, syrup, or other topping (Col. 2, lines 56-60). Grigoli's topping decoration is significantly different and much simpler to achieve than the marbled appearance of Kuehl's bar, and one of ordinary skill in the art would not look to Kuehl to further decorate Grigoli's cone. Kuehl teaches attractive coatings for ice cream bars, not chocolate cone-shaped products. (See Leas declaration ¶14).

In addition, it would take a significant re-design of Kuehl's equipment to provide the presently claimed string pattern. More importantly, the maintenance of a smooth outer surface is not of significance to Kuehl's products. The primary purpose of Kuehl is to impart an attractive appearance to its chocolate bars, rather than impart a more pleasing taste. This is evidenced by Kuehl's emphasis on the different patterns, shapes, or colors of the coatings. The maintenance of a smooth outer surface is not of significance to Kuehl's products. Smoothness is incidental and requires an additional step (i.e., placement of different colored chocolate strips in a mold) to accomplish. Kuehl also does not utilize a sleeve that conforms to the outer surface of the confection. In contrast, the present invention is made in a much less complicated manner, with the strings being provided to conform to and be in contact with a packaging sleeve of similar dimensions during formation of the shell so that a smooth outer surface is automatically achieved during formation of the product. (See Leas declaration ¶15).

As discussed previously, there is no suggestion or motivation to combine Grigoli with Kuehl. Similarly, there is no suggestion or motivation to combine Kuehl with Damato. Damato is concerned with conical ice cream products, not bars. The Examiner asserts that to one having ordinary skill in the art, the teachings of Damato are irrespective of whether the product is conical or any other shape, since Damato teaches packaging means for ice cream products that

allow the user to see the product directly. Ice cream bars would not, however, require a separate container and lid, as taught by Damato. In addition, Damato also does not appear to teach a chocolate shell, but a wafer cone (*See* FIG. 3), which is absent from Kuehl. (*See* Leas declaration ¶16).

In the present invention, the packaging sleeve is utilized for multiple purposes: it serves as a mold to enable formation of the confectionery cone and also assures that the outer surface of the chocolate cone is smooth. The different colored confectionery materials can be provided in various arrangements including patterns, messages, even writing in block or script to provide a pleasing and desirable appearance to the outer surface of the cone. This is why in a preferred embodiment the packaging sleeve is entirely transparent, as it enables the message or pattern to be observable to the consumer upon purchase of the product, thus also serving to display the product for purchase. These features are all provided by the structure recited in the present claims, and render these claims patentable over the cited art.

Accordingly, as neither Grigoli, Kuehl, or Damato teach a fat-based shell that has its entire surface in a pattern of at least two different colored confections and with the outer surface of the shell in complete surface-to-surface contact with a packaging sleeve, as presently recited in claim 1 and new claim 34, these claims are not obvious over those references. Thus, the rejection under 35 U.S.C. § 103(a) should be reconsidered and withdrawn.

Claim 27 was rejected under 35 U.S.C. § 103(a) as obvious over Grigoli in view of Kuehl and Damato as applied to claims 1-4, 8-10, 25, 26, 29-30, 32, and 33, and further in view of Japanese Publication JP 2000-118590 to Tanaka et al. ("Tanaka") for the reasons cited in the previous Office Action.

Tanaka is concerned with allowing ice cream to eaten by a spoon as in a cup-shaped container, and also allowing the portion of the cone cup to be held by the hand (Abstract). A cone-shaped container is provided by integrating a cone cup for housing ice cream, a lower cup portion for accommodating the cone cup, and an upper cup portion (Abstract). The cone cup is made from a wafer (Paragraph [0015]).

There is no suggestion or motivation to combine Grigoli with Tanaka. Grigoli's chocolate shell is inserted in the wafer to protect it from the dampness of the ice cream, and preserve its crispness. As stated by the Examiner, the chocolate shell also acts as a cone for the ice cream, and the wafer also serves as a means for holding the chocolate cone. Grigoli also

shows that the ice cream filling is contained within the chocolate shell and does not extend above it and onto the packaging sheet. Modifying Grigoli in view of Tanaka so that the ice cream extends over the cone and contacts the sleeve would not be ideal. When the ice cream melts, it would flow behind the chocolate layer where it could wet the wafer and make it soggy and unappetizing. The ice cream would also wet the paper envelope, making it sticky. (See Leas declaration ¶17). Accordingly, claim 7 is not obvious in view of the cited references, and this rejection under 35 U.S.C. § 103(a) should be withdrawn.

Claim 31 was rejected under 35 U.S.C. § 103(a) as obvious over Grigoli in view of Kuehl and Damato as applied to claims 1-4, 8-10, 25, 26, 29-30, 32, and 33, and further in view of U.S. Patent No. 5,425,527 to Selbak ("Selbak") for the reasons cited in the previous Office Action.

Selbak discloses a container for ice cream and other frozen confections formed from a shell of baked cookie dough that may include particulate ingredients (Col. 5, lines 50-54). As discussed above, there is no suggestion or motivation to combine Grigoli with Kuehl or Kuehl with Damato. There is also no suggestion or motivation to combine Kuehl with Selbak since Kuehl is concerned with chocolate bars that do not include a cone, while Selbak deals with cookie dough cones. (See Leas declaration ¶18). Accordingly, claim 31 is not obvious in light of the cited references, and this rejection under 35 U.S.C. § 103(a) should be withdrawn.

Although not cited, Applicants want to distinguish the present invention over U.S. Patent No. 2,106,893 to Krein ("Krein"). Krein teaches a frozen confection partially or completely coated with chocolate and the whole contained in a temporary wrapper of paper or the like (Page 1, Right Column, lines 11-14). The wrapper may be in the form of conical paper cup (Page 1, Right Column, lines 39-40). Preferably, paper of the character commonly used in paper drinking cups is used, but a dry waxed paper was found to be particularly advantageous (Page 3, Left Column, lines 51-55).

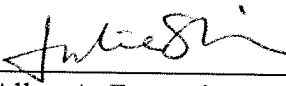
Like Grigoli, Krein uses a paper wrapper to enclose its product instead of the partially or entirely transparent packaging sleeve of the present invention. Krein is not interested in the appearance of his product, but is focused on providing a method to line a wrapper of paper with, for example, chocolate, and freezing a confection in and to the chocolate with sufficient facility and economy to warrant commercial production on a quantity basis (Page 1, Left

Column, lines 25-30). There would be no advantage in including a decorative pattern design on the shell of Krein, since the consumer would only see the wrapper. There is therefore no motivation or suggestion to include a decorative pattern on the surface of the chocolate shell of Krein since it would not be seen by the consumer during display of the product. (See Leas declaration ¶19).

The claims were provisionally rejected for obviousness type double patenting over the claims of copending applications 10/294,764, 10/385,177, 10/800,222 and 10/984,914. As the provision has not occurred in any of those applications and since the claims of this application are otherwise allowable, these rejections should be withdrawn. To the extent that any of these provisions occurs prior to the allowance of this application, Applicants will submit an appropriate terminal disclaimer to overcome any obviousness type double patenting rejection.

Accordingly, it is believed that the entire application is now in condition for allowance early notice of which would be appreciated. Should the Examiner not agree, then a personal or telephonic interview is respectfully requested to discuss any remaining issues in order to expedite the eventual allowance of this application.

Respectfully submitted,

Date 7/3/07 for:  (Reg. No. 57,073)
(Reg. No. 30,256)

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